PP

v.

OTTAVIO QUATTROCCHI

FEDERAL COURT, KUALA LUMPUR
STEVE SHIM CJ (SABAH & SARAWAK)
ABDUL MALEK AHMAD FCJ
MOHD NOOR AHMAD FCJ
[CRIMINAL APPEAL NO: 05-19-2003 (W)]
23 JUNE 2004

CRIMINAL PROCEDURE: *Extradition - Discharge order - Application for review - Decision of High Court upon review - Whether appealable - Extradition Act 1992, ss. 12(3), 19, 36, 37(6) - Courts of Judicature Act 1964, ss. 22, 50(1)*

CIVIL PROCEDURE: *Appeal - Appeal to Court of Appeal - Extradition proceedings - Discharge order - High Court confirming discharge order of Sessions Court upon review - Whether decision of High Court appealable - Whether right of appeal excluded by statute - Whether appeal misconceived - Extradition Act 1992, ss. 3, 12(3), 19, 36, 37(6) - Courts of Judicature Act 1964, ss. 22, 50(1)*

CIVIL PROCEDURE: *Appeal - Appeal to Federal Court - Extradition proceedings - High Court confirming discharge order of Sessions Court upon review - Appeal dismissed by Court of Appeal - Whether further appeal would lie to Federal Court - Extradition Act 1992, ss. 3, 12(3), 19, 36, 37(6) - Courts of Judicature Act 1964, ss. 22, 50(1), 87(1) - Federal Constitution, arts. 121(1B), 128(2) - Rules of Federal Court, r. 137*

WORDS & PHRASES: *"Any such order of the High Court shall be final and conclusive" - Section 37(6) Extradition Act 1992 - Whether barring any appeal against order thereof*

The Government of the Republic of India made a request for the extradition of the respondent upon allegations that he had committed "criminal conspiracy" and "criminal misconduct" in India. Following a special direction issued by the Minister of Home Affairs under s. 3 of the Extradition Act 1992 ('the Act'), and a warrant of arrest by the learned Magistrate under s. 12(3) thereof, the respondent was brought before the Sessions Court for an inquiry under s. 19 of the Act. However, upon the respondent's preliminary objections, the Sessions

Court ruled that the absence of formal charges against the respondent was fatal to the proceedings and, in the circumstances, dispensed with the inquiry and summarily discharged the respondent.

The appellant then applied to the High Court for a review of the discharge order under s. 37 of the Act, but the application was dismissed on the same ground as subscribed to by the subordinate court. On appeal, the Court of Appeal, after deliberating on the vital issue of whether, in an extradition proceeding, there is a right of appeal from the decision of the High Court to the Court of Appeal, answered the question in the negative and dismissed the appeal. More specifically, the Court of Appeal held that: (i) a decision such as made by the Sessions Court herein could only be challenged by an application for a writ of *habeas corpus* by the fugitive criminal, or by a review by the public prosecutor, and that it was the provisions of the Act, and not of the Criminal Procedure Code ('CPC') or the Courts of Judicature Act 1964 ('CJA') that applied to such proceedings; (ii) the Act was silent as regards the decision of the High Court in a *habeas corpus* application by the fugitive criminal, but since s. 36 of the Act has prescribed for such application to be made in accordance with the procedure in the CPC, the provisions of s. 374 of the CPC regarding appeal against a decision in a *habeas corpus* application applied thereto; (iii) pursuant to s. 37(6) of the Act, the order made in respect of a review by the public prosecutor was final, conclusive and not appealable; hence, there is no right of appeal against an order of the High Court confirming the order of the Sessions Court discharging a fugitive criminal; and (iv) the appellant's appeal under s. 50(1) of the CJA was misconceived in law.

Dissatisfied, the appellant appealed further raising *inter alia* and in the essence, the issues of: (i) whether the High Court, in acting under ss. 36 or 37 of the Act, was exercising its original jurisdiction; (ii) whether the finality clause in s. 37(6) of Act, which purported to exclude the jurisdiction of the Court of Appeal, was inconsistent with art. 121(1B)(a) of the Federal Constitution and was null and void; (iii) whether s. 50(1) of the CJA, read with art. 121(1B) of the Federal Constitution, conferred the appellant with an unfettered right of appeal to the Court of Appeal; (iv) whether the Court of Appeal was wrong as to its jurisdiction, and if so, whether the Federal Court, by virtue of r. 137 Rules of the Federal Court and art 128(2) of Federal Constitution, had inherent jurisdiction to correct the error; and (v) the competency of the instant appeal *vis-a-vis* s. 87(1) of the CJA.

Held (striking out the appeal)
Per Abdul Malek Ahmad FCJ delivering the judgment of the court:

[1] The only point to really consider was whether an appeal would lie to this court under s. 87(1) of the CJA in view of the provision in s. 37(6) of the Act which states that "any such order of the High Court shall be final and conclusive". (p 583 c)

[2] All things considered, we could only conclude that we were in agreement with the Court of Appeal on its findings. Consequently, we would hold that no appeal would lie to this court and would decline to make any ruling on the subsidiary issues raised. (p 589 h-i)

[3] There was no merit in the respondent's submission as regards costs, as costs could not be awarded against the Public Prosecutor pursuant to s. 322(iii) of the Criminal Procedure Code. (p 590 a-b)

*[**Bahasa Malaysia** Translation Of Headnotes*

Kerajaan Republik India telah membuat permohonan ekstradisi terhadap responden atas dakwaan bahawa beliau telah melakukan "komplot jenayah" dan "salahlaku jenayah" di Negara India. Ekoran perintah khas yang dikeluarkan oleh Menteri Hal Ehwal Dalam Negeri di bawah s. 3 Akta Ekstradisi 1992 ('Akta'), dan waran tangkap oleh Majisteret di bawah s. 12(3) Akta yang sama, responden telah dibawa ke hadapan Mahkamah Sesyen untuk satu penyiasatan di bawah s. 19 Akta. Walau bagaimanapun, atas bantahan awal responden, Mahkamah Sesyen telah memutuskan bahawa prosiding telah dimudaratkan oleh ketiadaan pertuduhan rasmi terhadap responden, dan atas alasan itu, telah membebaskan responden tanpa melakukan apa-apa siasatan.

Perayu memohon ke Mahkamah Tinggi untuk kajian semula di bawah s. 37 Akta, tetapi permohonan telah ditolak atas alasan yang sama sepertimana yang diberikan oleh mahkamah bawahan. Di rayuan, Mahkamah Rayuan, selepas mempertimbang persoalan sama ada, dalam suatu prosiding ekstradisi, rayuan boleh dibuat ke Mahkamah Rayuan terhadap keputusan Mahkamah Tinggi, telah menjawab persoalan tersebut secara negatif sekaligus menolak rayuan. Secara lebih spesifik, Mahkamah Rayuan memutuskan bahawa: (i) suatu keputusan seperti yang dibuat oleh Mahkamah Sesyen di sini hanya boleh dicabar melalui permohonan untuk writ *habeas corpus* oleh penjenayah buronan atau melalui permohonan kajian semula oleh pendakwa raya, dan bahawa undang-undang yang terpakai dalam prosiding sedemikian adalah peruntukan-peruntukan di dalam Akta, dan bukannya Kanun Prosedur Jenayah ('KAJ') atau Akta Mahkamah Kehakiman 1964 ('AMK'); (ii) tiada peruntukan di dalam Akta

mengenai keputusan Mahkamah Tinggi dalam suatu permohonan *habeas corpus* oleh penjenayah buronan, namun, oleh kerana s. 36 Akta menetapkan supaya permohonan sebegitu dibuat mengikut prosedur KAJ, maka s. 374 KAJ mengenai rayuan terhadap keputusan dalam permohonan *habeas corpus*, adalah terpakai kepadanya; (iii) berdasarkan s. 37(6) Akta, perintah yang dibuat ekoran permohonan kajian semula oleh pendakwa raya adalah muktamad, konklusif dan tak boleh dirayui lagi; oleh itu, tidak wujud sebarang hak merayu terhadap suatu keputusan Mahkamah Tinggi yang mengesahkan keputusan Mahkamah Sesyen yang melepaskan penjenayah buronan; dan (iv) rayuan perayu di bawah s. 50(1) AMK adalah tersalah bawa di sisi undang-undang.

Tidak berpuas hati, perayu merayu lagi sambil membangkitkan antara lain dan secara intinya, isu-isu: (i) sama ada Mahkamah Tinggi, sewaktu bertindak di bawah ss. 36 dan 37 Akta, telah melaksanakan bidangkuasa asalnya; (ii) sama ada fasal muktamad s. 37(6) Akta adalah bertujuan menyingkir bidangkuasa Mahkamah Rayuan, tidak konsisten dengan fasal 121(1B)(a) Perlembagaan Persekutuan dan adalah tak sah dan batal; (iii) sama ada s. 50(1) AMK, dibaca bersama fasal 121(1B) Perlembagaan Persekutuan, memberi hak mutlak kepada perayu untuk merayu ke Mahkamah Rayuan; (iv) sama ada Mahkamah Rayuan khilaf pada bidangkuasanya, dan jika begitu, sama ada Mahkamah Persekutuan, bersandarkan per. 137 Peraturan-Peraturan Mahkamah Persekutuan dan fasal 128(2) Perlembagaan Persekutuan, mempunyai bidangkuasa semulajadi untuk membetulkan kekhilafan; dan (v) keteraturan rayuan semasa dalam hubungannya dengan s. 87(1) AMK.

Diputuskan (membatalkan rayuan)
Oleh Abdul Malek Ahmad HMP menyampaikan penghakiman mahkamah:

[1] Satu-satunya persoalan yang perlu dipertimbangkan adalah sama ada rayuan boleh dibuat ke mahkamah ini di bawah s. 87(1) AMK dengan mengambilkira peruntukan s. 37(6) yang mengatakan bahawa "apa-apa perintah Mahkamah Tinggi yang sedemikian adalah muktamad dan konklusif".

[2] Mempertimbang semua perkara, kami hanya boleh merumuskan bahawa kami bersetuju dengan Mahkamah Rayuan atas segala dapatan-dapatannya. Kami dengan itu memutuskan bahawa tiada rayuan boleh dibuat kepada mahkamah ini sekaligus menolak untuk membuat sebarang keputusan atas isu-isu subsidiari yang dibangkitkan.

[3] Hujah responden berhubung kos tidak bermerit oleh kerana kos tidak boleh diperintahkan terhadap Pendakwa Raya di bawah s. 322(iii) Kanun Prosedur Jenayah.

Case(s) referred to:

Amand v. Secretary of State for Home Affairs & Anor [1942] 2 All ER HL 381 ***(refd)***

Chia Yan Teck & Anor v. Ng Swee Kiat & Anor [2001] 4 CLJ 61 FC ***(refd)***

Kedar Nath v. State of Bihar AIR [1962] SC 955 ***(refd)***

Lye Thai Sang & Anor v. Faber Merlin (M) Sdn Bhd & Ors [1985] 2 CLJ 423; [1985] CLJ (Rep) 196 SC ***(refd)***

Megat Najmuddin Dato' Sri (Dr) Megat Khas v. Bank Bumiputra Bhd [2002] 1 CLJ 645 FC ***(refd)***

MGG Pillai v. Tan Sri Vincent Tan Chee Yioun [2002] 3 CLJ 577 FC ***(refd)***

Pierson v. Secretary of State for the Home Department [1997] 3 All ER 577 ***(refd)***

Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan [200] 4 CLJ 105 FC ***(refd)***

R v. Bow Street Metropolitan Stipendiary Magistrate & Ors, ex p Pinoche Ugarte (No 2) [1999] 1 All ER 577 ***(refd)***

R v. Chief Metropolitan Stipendiary Magistrate, ex p Osman [1998] 3 All ER 173

Re Naranjan Singh [1961] 2 All ER 565 ***(refd)***

Tai Chai Yu v. The Chief Registrar of the Federal Court [1998] 2 CLJ 358 CA ***(refd)***

Union of India v. Manohar Lal Narang & Anor [1977] 2 All ER 348 ***(refd)***

Legislation referred to:

Court of Judicature Act 1964, ss. 3, 22, 50(1), 78, 81, 84, 87(1)

Criminal Procedure Code, s. 322(iii)

Election Offences Act 1954, s. 36

Federal Constitution, arts. 8(1), 121(1B), 128(2), 145(4)

Prevention of Corruption Act 1947, ss. 5(1)(d), 12(3), 15, 19(4), (5), 36, 37(1), (2), (6), 41, 87(1)

Rules of the Federal Court 1995, r. 137

Rules of the High Court 1980, O. 53

Specific Relief Act 1950, s. 54(e)

Penal Code 1860 [Ind], s. 5(2)

Other source(s) referred to:

Clive Lewis, *Judicial Remedies in Public Law*, pp 315, 316

RH Hickling, *Malaysian Public Law*, pp 186-189

For the applicant - Kamarul Hisham Kamaruddin DPP (Azmir Shah SFC)

For the respondent - Muhammad Shafee Abdullah; M/s Shafee & Co

Cyrus V Das holding watching brief for the Government of India; M/s Shook Lin & Bok

[Appeal from Court of Appeal, Criminal Appeal No: W-09-37-2002]

Reported by WA Sharif

JUDGMENT

Abdul Malek Ahmad FCJ:

The Government of the Republic of India had made a request for the extradition of the respondent Ottavio Quattrocchi, an Italian residing at 12 Jalan Langgak Golf, Kuala Lumpur in Malaysia accusing him of the commission of the following offences namely "criminal conspiracy (s. 120-B) read with s. 420 (cheating and dishonestly inducing delivery of property) of the Indian Penal Code 1860 and s. 5(2) read with s. 5(1)(d) (criminal misconduct) of the Prevention of Corruption Act 1947" within the jurisdiction of the Republic of India.

On 15 December 2000, the Minister of Home Affairs had accordingly issued a special direction under s. 3 of the Extradition Act 1992, hereinafter "the Act", to apply the provisions of the Act to the extradition of the respondent and, by order under s. 12(3) of the Act, authorised the Magistrate to issue a warrant for the apprehension of the respondent. The said warrant of apprehension was issued by the Magistrate on 18 December 2000 and the respondent was arrested on 20 December 2000.

Learned counsel for the respondent in the Sessions Court decided to proceed only on one issue and that was the question of the absence of charges in the proceedings. He argued that the respondent had a right to know the grounds of his arrest when the warrant of apprehension was issued and failing to inform him of such would render his arrest illegal.

Further, the charges were necessary during the proceedings in the Sessions Court to determine the issue of double criminality as, under the Act, the offences committed must be offences punishable under the law of the requesting country as well as the country to which the request is made. Finally, it was his contention that the absence of charges contravened the law of criminal procedure.

The appellant's reply was that extradition proceedings were in the nature of an inquiry and since it was not a prosecution, there was no necessity for charges to be framed. All the court had to decide was whether there was a prima facie case supporting the Minister's requisition order.

It was the view of the learned Sessions Court Judge that, at that stage, it was sufficient for the requesting country to specify in general terms the offences committed by the respondent without particularising them and the Minister has a discretion to act on this request. The only point to consider was whether the steps taken subsequently are correct in law.

However, he held that the general wording of the offences does not amount to sufficient notice to the respondent of the grounds of his arrest and, therefore, his arrest was illegal. Further, although the Magistrate acted correctly in pursuance of s. 15 of the Act in transferring the proceedings to the Sessions Court, the Sessions Court does not have the jurisdiction to review the execution of powers by a Magistrate in issuing the warrant of apprehension.

As for the offences stated in the requisition order, the Sessions Court Judge took the view that by describing the first offence of criminal conspiracy read with cheating, which are two separate offences under both the Indian and Malaysian laws, it had the effect of duplicity giving rise to ambiguity as extradition proceedings are subject to the principle of double criminality in the light of s. 6 of the Act. Similarly, for the second offence of criminal misconduct, the Sessions Court Judge held that it was too vague and general to fall under s. 6 of the Act. Consequently, the Sessions Court Judge ruled that the offences stated in the requisition order was tainted with illegality which would prejudice the respondent in conducting his defence following the procedure in the Sessions Court provided for in s. 19 of the Act.

The conclusion of the Sessions Court Judge was as follows:

> This being the case the law of Evidence especially the law as to relevancy of evidence applies in extradition cases. Without a proper description of the offences committed it will be impossible for the Court to determine whether evidence led is relevant or not for purposes of admissibility. This again fortifies my view that a proper description of the offences has to be given at the outset for the Court to play an effective role in deciding whether a prima facie is proven as is required under section 19(4) and (5) of the Act.
>
> In the final analysis it is my decision that a proper description of the offences committed by the subject have to be tendered in Court. The failure to do so amounts to non-compliance of the Law. I will go as far to say under such circumstances the tendering of charges would have been preferable. Further it is my observation that the burden lies with the requesting country to produce this description of the offences as they are in the best position to know the exact offences committed if any by the subject.
>
> I am directing that the subject be discharged of this extradition proceeding upon which his bail and all condition attached to the bail be also discharged.

The appellant promptly applied for a review of the order made by the Sessions Court pursuant to s. 37 of the Act. Apart from the issue of no formal charges being framed against the respondent, the appellant had applied for leave to allow Dato' Dr Cyrus V Das, hereinafter "Dato' Das", and Steven Thiruneelakandan, both local advocates and solicitors, to hold a watching brief for the Government of India. Halfway through the proceedings, the High Court was informed that Dato' Das had been authorized to appear on the appellant's behalf.

The High Court Judge held, as regards the application to hold a watching brief, as follows:

> **Application to hold a watching brief**
>
> At the commencement of the hearing before me the learned deputy public prosecutor applied for leave to allow Dato' Dr Cyrus V Das and Mr Steven Thiruneelakandan, both advocates and solicitors, to hold a watching brief for the Government of India. In my opinion, the process of an advocate and solicitor holding a watching brief is a form of legal representation for a person. If that person is already represented by counsel to conduct the proceeding it is inappropriate for him to be further represented by another counsel in a different form. Ordinarily, the public prosecutor cannot be said to represent the complainant in a criminal prosecution. He does not take instructions from the complainant but acts for the state and exercises his own discretion as the guardian of public interest. However, in the case of an extradition inquiry he acts on the instructions of the requesting country to some extent. This is evidenced by s 37(1) of the Act where, in applying for a review when a fugitive criminal has been discharged, he acts '… at the request of the country seeking the return …'. To that extent the Government of India is already represented in the proceedings. Accordingly, I dismissed the application. However, I invited counsel to be present in court to render whatever assistance they could which they did graciously. They were not hindered from participation at any stage of the proceeding. I appreciate and acknowledge the immense contribution made by them.

Pertaining to the authorisation by the public prosecutor under s. 41 of the Act, the High Court Judge said:

> **Authorisation by the public prosecutor under s. 41 of the Act**
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> When the proceeding had already commenced the learned deputy public prosecutor informed me that the public prosecutor had authorized Dato' Dr Cyrus V Das to appear on his behalf under s. 41(1) of the Act which reads as follows:
>
> > Any barrister, advocate and solicitor or legal officer in the employment of the government of any country may with the written authorization of the public prosecutor appear on his behalf in any proceedings under this Act.
>
> The validity of the authorization given by the public prosecutor is dependent on the interpretation to be accorded to this subsection. The words '… or legal officer …' are followed by the words '… in the employment of the government of any country …'. The question for determination is whether this qualification is confined in its operation to just a 'legal officer' or also includes the

preceding two categories of persons. The absence of a comma before the words '… or legal officer …' in the subsection means that the qualification made must be construed conjunctively as applying to all the three categories of persons mentioned ...

It is also my view that the very fact of employment of an advocate and solicitor for the purpose of appearing in this proceeding will not render him to be a person in the employment of the government of any country for the purpose of the subsection as its language refers to a person who is already in employment. In the circumstances I hold that the three categories of persons enumerated in the subsection refer to persons '… in the employment of the government of any country …'. Accordingly, I declined to accept the authorization of the public prosecutor. This is an order which I made with considerable regret as Dato' Dr Cyrus V Das is one of the foremost advocates and solicitors in the country and his advocacy skills, preparation of a case and conduct in court in the highest traditions of the Bar are too well-known. Despite my ruling, he and his colleague were given full liberty to address the court as *amicus curiae.*

On the point for the need for specific charges to be framed, the relevant excerpt of the High Court judgment states:

The need for a charge

The critical matter for deliberation is the objection of the respondent that he has not been furnished with the charges so as to enable him to conduct his defence fairly and effectively. It was contended by the prosecution that it is not possible to tender the Indian charges as they can only be framed in the presence of the respondent as provided by s 240 of the Indian Criminal Procedure Code and that service of the requisition documents on the respondent was sufficient to provide the required particulars. It was further argued that the Act does not require the formulation of a charge. The primary question that requires to be answered is whether there is a right to a charge under the Act even if it does not authorize it. The answer becomes apparent if the purpose of a charge is understood. A person against whom an order to his prejudice may be passed should be informed of the allegations and charges against him (see *Union of India v. Tulsiram Patel* AIR [1985] SC 1416). This is because one of the fundamental principles of natural justice is that a party in a legal proceeding must have a reasonable opportunity of presenting his case (see *Russell v. Duke* [1949] 1 All ER 109). Thus he must be given notice of the case or the charges which he has to meet (see *Triambak Pati Tripathi v. BHS & I Education, Allahabad* AIR [1973] All 1). In *Ozie Powell v. State of Alabama* 287 US 45 it was held that notice is one of the premilinary steps essential to the passing of an enforceable judgment. Disclosure of the charge must therefore be made in reasonable time to allow the person affected to prepare his defence (see *R v. Liverpool Corporation, ex p Liverpool Taxi Fleet*

Operators' Association [1972] 2 QB 299). Failure to provide a charge will be equivalent to a denial of the opportunity to be heard. As Geoffrey Flick says in his book entitled *Natural Justice* (2nd Ed) at p 55:

> Professor de Smith correctly observed that in a large majority of the reported cases where a breach of the audi alteram partem rule had been alleged, no notice whatsoever of the action to be taken had been given to the person claiming to be aggrieved, and that failure to give prior notice had been the equivalent of a denial of the opportunity to be heard: de Smith p 196.

Later on in the judgment, the High Court Judge after dealing extensively on the difference between charges and offences and the particulars for the offences, concluded his judgment in the following manner:

> As the particulars of the offences cannot be identified the need for charges assume significance. At the end of its submission the prosecution invited the court to make an order, as an alternative solution, for the prosecution to frame and serve the charges and thereby re-open the inquiry. I cannot comply with this request for two reasons. Firstly, I cannot make an order for charges to be framed when I know that it cannot be done in light of the reasons that I have discussed earlier. Secondly, I do not see any reason why I should accede to a request to order a party to do something when that party is unwilling to do it itself. If, on the other hand, the prosecution itself had tendered the charges I would have seriously considered remitting the case back to the sessions court for hearing, subject to submissions by the respondent. But that was not done. The problems encountered in this case could have been avoided if charges had been framed and served.
>
> Without the charges or, in the alternative, proper particulars of the offences, the inquiry before the sessions court just could not have started. In the upshot, it is my view that failure to supply the court and the respondent with the charges is fatal. The ruling made by the learned sessions court judge on the preliminary objection raised by the respondent is therefore correct in law. Accordingly, I confirm the order of discharge made by him and dismiss this application.

Before the Court of Appeal, although other preliminary issues were raised, we will first deal with the question as to whether there is a right of appeal against the decision of the High Court in the review proceedings under the Act.

This is clearly evident in the Court of Appeal judgment where it said:

> Considering the number of important issues arising from the present case, in particular whether charges should have been framed against the respondent by the Union of India and read to him when he appeared at the sessions court, whether the sessions court was empowered to discharge the respondent without

holding a full enquiry pursuant to s. 19 of the Act, whether the learned High Court judge, in the review proceedings, exceeded his jurisdiction in considering matters other than those considered and decided upon by the sessions court judge and whether the learned High Court judge was right in his interpretation of the phrase 'advocate and solicitor' in s. 41(1) of the Act; and further considering that the issues, as far as we know, have never been decided by this or a more superior court, this case should be a proper case for us to exercise our discretion to hear the appeal. But, that is subject to one most important condition, that is, in law there must be a right of appeal to this court. If there is none, then this court has no discretion to exercise.

Is there a right of appeal?

We now come to the most vital issue: whether in an extradition proceedings, there is a right of appeal from the decision of the High Court to the Court of Appeal. This is the main issue in this application. If there is no right of appeal, then the purported notice of appeal must be struck out and the application for an interim order under s. 44(1) of the Courts of Judicature Act 1964 is not maintainable.

The judgment went on as follows:

So, is there a right of appeal from the sessions court to the High Court from a decision in an extradition proceedings? In our view, the answer is in the negative. The Act, a specific Act, provides the procedure for such an inquiry. The way to challenge the decision of the sessions court in such a proceedings is either by way of an application for a writ of *habeas corpus* (on the application by the fugitive criminal) or by way of a review (on the application by the public prosecutor). It is these provisions that are applicable, not the provisions of the Criminal Procedure Code or the Courts of Judicature Act 1964.

Is there a further appeal from the High Court to the Court of Appeal? Again, we will have to look at the provisions of the Act first. The Act is silent regarding a decision of the High Court in a *habeas corpus* application by the fugitive criminal. However, as the Act (s. 36) itself provides that the application for *habeas corpus* is to be made in accordance with the procedure as provided by the Criminal Procedure Code, the provision of s. 374 of the Criminal Procedure Code regarding appeal against a decision in a habeas corpus application applies. The case of Chua Han Mow is one such example.

On the other hand, regarding a decision of the High Court in an application for a review by the public prosecutor there is a specific provision in the Act that the order made by the High Court is final and conclusive.

Do the words 'final and conclusive' mean that the orders are not appealable? We are of the view that the answer is obvious, ie such orders are not appealable. We do not think that any other meaning could be given to the phrase.

The conclusion is clearly stated in the following excerpt of the judgment:

> We are of the view that, for the same reasons given by this court in *Yong Teck Lee* [2002] 3 MLJ 230, there is no right of appeal against an order of the High Court confirming the order of the sessions court discharging a fugitive criminal. The Legislature has made it very clear that that is what it wanted the law to be. It is not for the court to rewrite the law made by the Legislature. It is not its function. Neither should it encroach into the jurisdiction of the Legislature.
>
> It was argued for the applicant that the provision of s. 37(6) of the Act applies only to a full merit inquiry under s. 19. In this case the sessions court did not hold such an inquiry but instead summarily discharged the respondent on preliminary objections relating to a non-existence of the charges. It was also argued that the learned judge of the High Court had failed to confine himself to the issues that were raised before the sessions court and instead erroneously embarked on a full blown inquiry under s. 19 of the Act and decided on matters that were not strictly before him. The learned High Court judge erred in law when he conducted the review under s. 37 of the Act as if it was an inquiry under s. 19 of the Act and thereby allowed the proceedings to miscarry. In doing so the learned High Court judge exceeded his jurisdiction and power under s. 37 of the said Act. A number of grounds were also forwarded on the merits of the appeal, including that a formal charge was not a pre-requisite to a request for extradition under the Act and that the learned judge had erred in law when he construed the phrase 'advocate and solicitor' in s. 41(1) of the Act as not including an Advocate and Solicitor of the High Court of Malaya.
>
> We must first of all note that we are not, at this stage, hearing the appeal against the decision of the learned High Court judge. Therefore, whether he was right or wrong is not for this court to decide in this application. We are only hearing the application to set aside the order of 16 December 2002 and the notice of appeal. And, the issue we are now discussing it whether, in law, there is a right of appeal from the decision of the learned High Court judge.
>
> It is true that the sessions court had decided merely on the preliminary objection and not after a full enquiry under s. 19. But, the fact remains that he had decided to and discharged the respondent. It is a fact that against that decision there was an application for a review under s. 37, a review was done and the learned High Court judge had given his decision. It is against that decision that the applicant purports to appeal to this court. Is there a right of appeal? That is the question. We are of the view that, in view of the provisions of s. 37(6) of the Act, there is none.

As for the distinguishing features of revision, review and appeal, the Court of Appeal made the following comments:

In any event of s. 50 of the Courts of Judicature Act 1964, even if applicable (which we think is not), does not help the applicant. Section 50(1) of the Courts of Judicature Act 1964 provides that 'the Court of Appeal shall have jurisdiction to hear and determine any appeal against any decision made by the High Court:

(a) …

(b) in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by the Sessions Court.

The words 'or revisionary' were inserted by Act A909 which came into force on 24 June 1994. The word 'revisionary' clearly refers to 'revision' in Ch XXXI of the Criminal Procedure Code, especially s. 323. If the word 'appeal' includes 'revision', there is no reason for the word 'revision' to be inserted. The word 'appeal' too cannot include 'review'. As far as we can ascertain, the Criminal Procedure Code does not provide for a review. For the same reason the word 'revision' cannot include 'review'. It appears in the Extradition Act 1992. We are of the view that the word 'review' was purposely used to distinguish it from 'revision' under the Criminal Procedure Code.

There are clear distinctions between a 'revision' under the Criminal Procedure Code and a 'review' under the Act.

First, the Criminal Procedure Code does not state at what particular stage of a proceedings in the subordinate court that the High Court may exercise the power of revision. On the other hand, a review under the Act may only be made after the close of the proceedings in the sessions court.

Secondly, in the case of a revision, the High Court judge himself may call for the record for the purpose of revision. In the case of a review, it has to be on an application by the public prosecutor at the request of the country seeking the return of the fugitive criminal.

Thirdly, review is only against an order of a discharge and nothing else. On the other hand, the reasons for which a High Court judge may exercise his power of revision is much wider, ie 'for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of that Subordinate Court' – s. 323(1) of the Criminal Procedure Code.

Fourthly, without going into details, the powers of a High Court judge in a revision is much wider that that of a judge hearing a review under the Act – see ss. 36 and 37 of the Act and ss. 324 and 325 of the Criminal Procedure Code. Furthermore as said by the Federal Court in *Chua Han Mow* an extradition proceedings is in the nature of a committal proceedings, not a trial.

> We are also of the view that had the Legislature intended to include a review under the Extradition Act 1992, it would have inserted the word 'review' when it inserted the word 'revisionary' in s. 50 of the Courts of Judicature Act 1964.

In the process of striking out the appeal, the Court of Appeal said:

> It was also argued that the public prosecutor is also appealing against the order of the High Court in declaring that the fiat given by the Attorney-General to Dato' CV Das was unlawful as it does not fall within the provisions of s. 41(1) of the Act. The first thing to be noted is that there is no separate appeal against that decision ...
>
> Note that the appeal is against the decision of the learned judge in which he dismissed the application of the applicant for a review under s 37 of the Act and thereby discharged the respondent unconditionally …
>
> If we may be excused for saying so, we think it is very unfortunate that this and higher courts are deprived of the opportunity to determine the important issues that have arisen in this case. It is unfortunate that the determination of such important issues are left only to the High Court to determine and become law. If we may suggest, we think that the Legislature should consider amending the Act to provide for appeals in cases such as this. The highest court in the country should have the opportunity to determine such important points of law. What more when the decision affects the bilateral relationship between Malaysia and a foreign country. Furthermore, if a fugitive criminal, through habeas corpus proceedings, may go to the highest court in the country to challenge an order made against him, we see no reason why the public prosecutor, representing the Government of Malaysia at a request of a country with which Malaysia has entered a binding agreement for the extradition of fugitive criminals, should not have a similar right where an order is made in favour of the fugitive criminal. But that is a matter for the Legislature to decide. The Judiciary should and could say no more. The function of the court is to apply the law as it is.

The appellant appealed against the order of the Court of Appeal in striking out the appellant's appeal against the decision of the High Court Judge confirming the order of discharge made by the Sessions Court Judge. This matter had in fact been fixed for disposal before us on 8 December 2003 as it was a matter emanating from the Sessions Court and in normal circumstances, the last avenue for appeal would be, after the High Court, only to the Court of Appeal. The parties were accordingly informed and on that morning Deputy Public Prosecutor Kamarul Hisham Kamaruddin, hereinafter "the learned Deputy", appearing for the Public Prosecutor objected to the disposal and requested that the matter be formally argued. To enable parties to prepare their submissions and authorities, we adjourned it to the next day.

The learned deputy, in his usual oratorial manner, started off by saying that when the High Court sat in review, it was exercising its original, as opposed to its appellate, jurisdiction. He referred to s. 87(1) of the Courts of Judicature Act 1964, hereinafter "the CJA", which provides as follows:

> 87. (1) The Federal Court shall have jurisdiction to hear and determine any appeal from any decision of the Court of Appeal in its appellate jurisdiction in respect of any criminal matter decided by the High Court in its original jurisdiction subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal.

He said that the Sessions Court discharged the respondent unconditionally on 2 December 2002 as there were no formal charges made against him. The discharge, he added, was made summarily on the preliminary objection that there were no charges framed.

The relevant provision for the discharge is s. 19(4) of the Act which states:

> (4) If the Sessions Court is of the opinion that a *prima facie* case is not made out in support of the requisition of the country concerned, the Court shall discharge the fugitive criminal.

At this juncture, it is relevant to reproduce s. 37 of the Act:

> 37 (1) Where a fugitive criminal is ordered by the Sessions Court to be discharged under subsection 19(4), the Public Prosecutor may, at the request of the country seeking his return, within ten days of the making of the order by the Sessions Court, apply to the High Court for a review of the order of discharge on any question of law, and on such application the High Court may so review the order.
>
> (2) Where the Public Prosecutor desires to make such an application, he shall, at the time of the making of the order of discharge by the Sessions Court, give to the Court notice of his intention to apply to the High Court for a review of the order, and such notice shall operate as a stay of the order of discharge by the Sessions Court:
>
> (a) until the expiration of the period of ten days, beginning with the day on which the order of discharge was made; or
>
> (b) if an application for a review of the order of discharge is made, until the determination of the application by the High Court.
>
> (3) Where the Public Prosecutor gives notice of his intention to apply for a review of the order of the Sessions Court, the Court may grant, to the fugitive criminal in respect of whom the order of discharge was made, bail pending the determination by the High Court of the application.

(4) Upon application for a review of the order of discharge, the Sessions Court Judge shall transmit to the High Court the exhibits tendered before him, the evidence admitted in Court, the reasons for his decision and his finding on any question of law which arose during the inquiry.

(5) The High Court to which an application is made for a review of an order of discharge may order the release on bail of the fugitive criminal on such terms and conditions as the Court thinks fit pending determination of the application for review.

(6) The High Court may confirm, vary or quash the order or make a new order in substitution for the order so quashed, and any such order of the High Court shall be final and conclusive.

The learned deputy argued that the Court of Appeal did not go into the merits but only dealt with the question of jurisdiction. It held that the High Court was not using its appellate or revisionary powers but only its review powers. He added that an anomalous situation had arisen because if the High Court exercised its original jurisdiction but the Court of Appeal did not exercise its appellate jurisdiction, no appeal lies to this court.

He emphasized that there must be inherent jurisdiction for this court to correct errors in the courts below. He referred to *Chia Yan Teck & Anor v. Ng Swee Kiat & Anor* [2001] 4 CLJ 61. In that case, the respondents claimed that when judgment was pronounced by the deputy registrar in open court on 22 December 2000, the court was not duly constituted as there was only one judge remaining out of the three that had heard the appeal as the other two judges had retired before that date although they had signed the decision on 19 December 2000. The appellants argued that the effective date was the date of the signing and that the judgment was not a nullity.

This court held that the effective date of judgment was the date of pronouncement in open court and not the date when it was signed by the remaining two judges of the court. It disagreed with the appellants that it did not have the jurisdiction to hear the application to set aside the judgment as r. 137 of the Rules of the Federal Court 1995, hereinafter the "RFC", clearly gave the court the inherent powers to hear any application or to make any order as may be necessary to prevent injustice. The respondents' application was accordingly allowed and it was ordered that the appellants' appeal be reheard by a newly constituted panel of this court.

In *MGG Pillai v. Tan Sri Vincent Tan Chee Yioun* [2002] 3 CLJ 577, the appeal was heard by this court on 12 and 13 January 1998. The judgment was read out by a senior assistant registrar on 12 July 2000 but one of the three judges had retired ten days earlier although approval to the judgment had been intimated by him earlier.

In a majority decision, this court allowed the applicant's application to set aside the judgment following *Chia Yan Teck*'s case *(supra)* and that the matter be reheard by another panel as there was no consent obtained under s. 78 of the CJA for the matter to be continued in the absence of the third judge.

Similarly in *Megat Najmuddin Dato' Sri (Dr) Megat Khas v. Bank Bumiputera Bhd* [2002] 1 CLJ 645, this court held that it had the power to invoke r. 137 of the RFC where the Court of Appeal dismissed the appeal purely on the defectiveness of the appeal record.

Dato' Das for the Government of India touched on ss. 36 and 37 of the Act. The former, he said, was the remedy for the respondent while the latter, the remedy of the applicant. He added that the High Court in exercising *habeas corpus* powers is exercising powers in its original jurisdiction. He argued that where the review is not appealable, it violates the principle that the respondent has two rights of appeal but the applicant has no right of appeal at all.

As for the fiat given by the Attorney General as counsel for the Government of India, he said the High Court had said that it was unlawful in view of s. 41 of the Act. The applicant could not appeal separately in view of the definition of "decision" in s. 3 of the CJA but the Attorney General can still appear as well in view of his constitutional right.

Dato' Mohammad Shafee Abdullah for the respondent commented that a great deal of misunderstanding had arisen as regards the extradition procedure which is quite separate from civil or criminal procedure. He said that where the crime is of local jurisdiction committed overseas, it has nothing to do with extradition proceedings.

He made special reference to s. 87 of the CJA where the words "of the Court of Appeal in its appellate jurisdiction in respect of any criminal matter decided by the High Court in its original jurisdiction" have been used to signify the jurisdiction of this court to hear criminal appeals. He stressed that there were four hurdles to overcome namely "appellate jurisdiction", "in respect of", "criminal matter" and "original jurisdiction".

He said under s. 37(1) of the Act, emphasis has been laid on the word "discharged". In a preliminary enquiry, he added, where a person is discharged, there is no appeal. The Public Prosecutor, however, may persuade the High Court to do a revision. He commented that in criminal proceedings, there is never a rule of equality of remedies as highlighted by learned counsel for the Government of India. He reminded us that in those days when we had trials by jury, the prosecution could not even appeal against an acquittal. As such,

he pointed out, the question of inequality of remedies does not arise. He reiterated that ss. 37(2) and 37(6) of the Act were very strict and indicated that extradition proceedings can only go to the High Court.

Learned counsel reminded us that the respondent was brought to the Sessions Court on a warrant of arrest issued by a Magistrate. No charges had been preferred even up to the present day. Even in committal proceedings, he said, charges are preferred and read in proper language. Only certain sections of the law in India had been stated in the requisition order. With no charges, he argued, the whole proceedings were illegal.

He disagreed with the learned deputy that the matter in the Sessions Court was disposed of summarily. On the other hand, he said, it was heard fully and the relevant judgment was detailed on all points.

He referred to s. 22 of the CJA which is reproduced for ease of reference:

22(1) The High Court shall have jurisdiction to try:

(a) all offences committed:

(i) within its local jurisdiction;

(ii) on the high seas on board any ship or on any aircraft registered in Malaysia;

(iii) by any citizen or any permanent resident on the high seas on board any ship or on any aircraft;

(iv) by any person on the high seas where the offence is piracy by the law of nations, and

(b) offences under Chapter VI of the Penal Code, and under any of the written laws specified in the Schedule to the Extra-Territorial Offences Act 1976, or offences under any other written law the commission of which is certified by the Attorney General to affect the security of Malaysia committed, as the case may be:

(i) on the high seas on board any ship or on any aircraft registered in Malaysia;

(ii) by any citizen or any permanent resident on the high seas on board any ship or on any aircraft; or

(iii) by any citizen or any permanent resident in any place without and beyond the limits of Malaysia.

(2) The High Court may pass any sentence allowed by law.

This, he added, does not cover a review under the Act. Further, he added that a review is neither an appeal nor a revision under s. 50 of the Act.

For ease of reference, s. 50 of the Act is reproduced below:

> Jurisdiction to hear and determine criminal appeals
>
> 50. (1) Subject to any rules regulating the proceedings of the Court of Appeal in respect of criminal appeals, the Court of Appeal shall have jurisdiction to hear and determine any appeal against any decision made by the High Court:
>
> (a) in the exercise of its original jurisdiction; and
>
> (b) in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by the Sessions Court.
>
> (2) An appeal shall lie to the Court of Appeal, with the leave of the Court of Appeal, against any decision of the High Court in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by a Magistrates' Court but such appeal shall be confined to only questions of law which have arisen in the course of the appeal or revision and the determination of which by the High Court has affected the event of the appeal or revision.
>
> (2A) An application for leave under subsection (2) shall be made within fourteen days after the date of the decision of the High Court.
>
> (3) Notice of any appeal by the Public Prosecutor shall be given by, or with the consent in writing of, that officer only; and notwithstanding subsection (2) no leave of the Court of Appeal is required.
>
> (4) Except as otherwise provided in this section, an appeal may lie on a question of fact or a question of law or on a question of mixed fact and law.

In reply, the learned deputy stated that the distinction raised by learned counsel as regards extradition proceedings was merely procedural as the requirement of charges is not a substantive issue. From the requisition order, he added, the respondent has been made aware of the offences and accusations levelled against him.

As for what learned counsel for the respondent saying that extradition proceedings are not covered by s. 50 of the CJA, the learned deputy argued that this is answered by the decision in *R v. Chief Metropolitan Stipendiary Magistrate, ex parte Osman* [1998] 3 All ER 173 but this was rebutted by learned counsel who said that the term "criminal" in that authority refers to "local".

After the hearing, we reserved judgment. All three parties were requested to send further written submissions which they did. We feel we need to deal with them again although it borders on repetition.

Dato' Das's submission was dated 16 December 2003. He had two short points. The first was whether the High Court in acting under s. 37(1) of the Act was exercising its original jurisdiction as required under s. 87 of the CJA.

He argued that s. 36 of the Act is triggered where the fugitive criminal is committed to prison and awaits extradition. He may then apply to the High Court for *habeas corpus* to determine the correctness of the decision of the Sessions Court under s. 19(5) of the Act. Here, the High Court exercises its original jurisdiction and a further appeal may be made to this court.

In the opposite direction, he said, where the prosecution fails in the Sessions Court, a review under s. 37 of the Act is applied for. Here, no further appeal is allowed because of the finality clause in s. 37(6) of the Act.

Consequently, his submission was the principle of equality of remedies guaranteed under art. 8(1) of the Federal Constitution is breached as where an interpretation is possible that promotes fairness, or afford equal rights to litigants, that interpretation is to be preferred to any other: see *Kedar Nath v. State of Bihar* AIR [1962] SC 955 for the proposition that an interpretation should be preferred that makes a statutory provision conform with constitutional rights, and *Pierson v. Secretary of State for the Home Department* [1997] 3 All ER 577 for the proposition that Parliament must be presumed not to legislate contrary to the rule of law but to provide for substantive and procedural fairness.

He further submitted that it cannot be that the High Court sits in its "original jurisdiction" under s. 36 of the Act at the instance of the respondent but sits in its "appellate jurisdiction" under s. 37 of the Act at the instance of the appellant. Sections 36 and 37 of the Act must be seen as flip sides of the same coin and that under both sections, therefore, the High Court sits in its "original jurisdiction".

As regards the fiat, he stressed that the High Court was wrong in reading the words "barrister", "advocate and solicitor" and "or legal officer in the employment of any country" conjunctively. Further, he added, the Court of Appeal was wrong to say that the question was to be appealed separately in view of the word "decision" in s. 3 of the CJA.

Learned counsel added that we are concerned with a less momentous question here, namely, whether counsel for the requesting state on an extradition case could be empowered by a fiat by the Attorney General to conduct the case. It is a collateral question of rights of appearance and audience not affecting the main question under s. 37 of the Act. It does not affect the Attorney General's rights of audience which is constitutionally guaranteed under art. 145(4) of the Federal Constitution.

Thus the fiat question, he said, could not have been separately appealed. It had to be brought up along with the main appeal like any question involving an interlocutory ruling not deciding the outcome of the case. In the present context, the question under s. 41 of the Act cannot be caught by the finality clause in s. 37(6) of the Act.

Nevertheless, he continued, the fiat question under s. 41 of the Act is a question of public importance that arises for the first time in our courts, and it is appropriate that the scope of the Attorney General's powers under the provision be settled by this court.

The learned deputy's submission, which was dated 30 December 2003, focused on five issues. The first was the question of the original jurisdiction of the High Court when it exercised its review powers under s. 37(1) of the Act. Consequently, an appeal lies to this court under s. 87(1) of the CJA.

His contention was that the original criminal jurisdiction of the High Court under s. 22 of the CJA is undefined. That section deals only with the jurisdiction of the High Court to try offences and pass any sentence by law. He argued that there are only three jurisdictions of the High Court conferred by the CJA by ss. 22 to 37 which are the exercise of the original, appellate and revisionary jurisdiction. These coincide with the wording of s. 50(1) of the CJA. There are no other jurisdictions known under law by virtue of art. 121(1) of the Federal Constitution which confers jurisdiction on the High Court as may be provided by federal law.

However, he added, by virtue of para. 1 of the Schedule to the CJA, the High Court is conferred the power to issue prerogative writs in the nature of *habeas corpus*, *certiorari, mandamus* and the like. Although the word "power" is used, the exercise of these powers is an exercise of the High Court's original jurisdiction as an appeal lies by virtue of s. 87 of the CJA to this court. He further submitted that the word "review" does not occur in the CJA in so far as there is no separate review jurisdiction conferred by the CJA and, therefore, the exercise of review power under s. 37(1) of the Act must be an exercise of either one of the three jurisdictions conferred.

He went on to say that the Court of Appeal came to the conclusion that a "review" under s. 37(1) of the Act was not an exercise of either revisionary or appellate jurisdiction. It has to be, therefore, an exercise of original jurisdiction in the same manner as the exercise of powers of judicial review of the High Court. To accept a separate 'review' jurisdiction, he concluded, would be to accord a jurisdiction to the High Court not conferred by the CJA.

The second issue was the finality clause in s. 37(6) of the Act read with s. 50(1) of the CJA. His reasoning was that the issue in *Yong Teck Lee (supra)*, was whether s. 36 of the Election Offences Act 1954 which purported to exclude jurisdiction of the Court of Appeal to hear an appeal from a final order of an Election Judge was inconsistent with art. 121(1B)(a) of the Federal Constitution and thereby void. The minority decision in that case, he said, is authority for the proposition that a statute law which purports to exclude the jurisdiction of the Court of Appeal is inconsistent with art. 121(1B) of the Federal Constitution and is void and of no effect. In the same manner, in so far as s. 37(6) of the Act purports to deny the Court of Appeal jurisdiction conferred by art. 121(1B)(a) of the Federal Constitution to hear appeals from the High Court, it is *ultra vires* the Federal Constitution and the argument must fall.

He submitted that the majority decision is authority for the proposition that the Federal Constitution cannot be read in isolation but must be read with the CJA. Read together, s. 68 of the CJA appears to qualify art. 121(1B) of the Federal Constitution by providing that a statute law may limit appeals to the Court of Appeal. Section 36 of the Election Offences Act 1954, being such a statute law, is not therefore unconstitutional. In the same manner, he added, to determine if s. 37(6) of the Act is *ultra vires*, one must read it together with s. 50(1) of the CJA and art. 121(1B) of the Federal Constitution. Reading thus, therefore, s. 50(1) of the CJA and art. 121(1B) of the Federal Constitution confer a right of appeal to the Court of Appeal with no limitation or qualification. Therefore, s. 37(6) of the Act is not consistent with both s. 50(1) of the CJA and art. 121(1B) of the Federal Constitution and must fall on that count. Section 50(1) of the CJA must stand given the inconsistency and an appeal lies to the Court of Appeal. In the event, he said, the Court of Appeal below was accordingly wrong as to its jurisdiction to entertain the appeal.

The third issue was that the Court of Appeal was wrong as to its jurisdiction. Accordingly, this Court has inherent jurisdiction to correct the error. He submitted that a decision by the Court of Appeal as to its jurisdiction decided pursuant to a preliminary objection or motion to set aside a notice of appeal may not be a decision in an "appellate jurisdiction". This court has inherent jurisdiction, encapsulated under r. 137 of the RFC, to correct an injustice. An

injustice would clearly occur here by denial to a litigant a final tier of appeal clearly provided by law. This court had exercised this jurisdiction in *Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Berhad (supra)*, where in analogous circumstances, the Court of Appeal ruled on a preliminary objection by the respondent and dismissed an appeal to it, because of a defect in the appeal record. Correcting the error of law, this court held that the Court of Appeal had erred and invoking its inherent jurisdiction, ordered the appeal to be heard by the Court of Appeal.

He argued that this is a fit and proper case for this court to invoke its inherent powers to prevent injustice, there being no statutory impediment to the exercise of the power as existed in the cases of *Tai Chai Yu v. The Chief Registrar of the Federal Court* [1998] 2 CLJ 358 and *Lye Thai Sang & Anor. v Faber Merlin (M) Sdn. Bhd. & Ors.* [1985] 2 CLJ 423; [1985] CLJ (Rep) 196. The exercise of similar powers had been taken by this court in *MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun (supra)* and *Chia Yan Teck & Anor v. Ng Swee Kiat & Anor (supra)* and the House of Lords in *R v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinoche Ugarte (No. 2)* [1999] 1 All ER 577.

The fourth issue is a review under s. 37(1) is a criminal matter. In support, he said that the test of whether a matter is criminal or not is whether the outcome of the matter is one of which "may be the trial of the applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to do so ..." as held in *R v. Chief Metropolitan Stipendiary Magistrate, ex parte Osman (supra)*. He added that as a matter of law, a matter is "criminal" equally for the purpose of costs as well as for the purpose of appeal jurisdiction, there being no meaningful distinction between the two as to the criminal nature of the matter.

The fifth issue is that this court has powers under art. 128(2) of the Federal Constitution to hear any matter. This is because that provision confers a jurisdiction to determine a question which arose "in any proceedings before another court, … as to the effect of any provision of this Constitution" and to remit the case to that other court to be disposed of in accordance with its determination. This jurisdiction is called original jurisdiction by s. 81 of the CJA. In this case, a question as to the interpretation of art. 121(1B) of the Federal Constitution, read with s. 50(1) of the CJA clearly arose *vis a vis* s. 37(6) of the Act in the proceedings before the Court of Appeal, as to its jurisdiction. No stay of proceedings may operate in the Court of Appeal for a reference to be made to this court, when the question arose as there is no provision similar to s. 84 of the CJA applicable to the Court of Appeal as

would happen if the question arose in the High Court. He submitted that this court now may determine such a constitutional question, and if this court agrees with the appellant, direct the Court of Appeal to hear the merits of the appeal.

Learned counsel for the respondent's submission dated 6 January 2004 was a reply to the five issues raised by the learned deputy. For the first issue, he said that s. 37(1) of the Act states clearly that the review powers are invoked only upon "a discharge" of the subject ordered by the Sessions Court under s. 19(4) of the Act. The requesting country can only seek review through the appellant. Clearly, this is not a classic "judicial review" environment where a party seeking the judicial review need only show he is the "affected party" and in such event, he can seek the judicial review himself without going through "an agent", such as the appellant. Other requirements within the section also show that the review is not the classic judicial review within O. 53 of Rules of the High Court 1980, hereinafter "the RHC", to make it an original jurisdiction exercisable in the High Court. For example:

(a) no leave is required under section 37 of the Act for a review unlike Order 53 of the RHC where an *ex parte* application for leave is required;

(b) only 10 days are allowed for the time period to review under section 37 of the Act as compared with Order 53 of the RHC which allows for 40 days;

(c) a review is only on a "question" of law under section 37 of the Act whereas the ambit is wider under Order 53 of the RHC;

(d) upon a mere request for a review under section 37 of the Act, such notice operates as an automatic "stay" while under Order 53 of the RHC, the stay is discretionary and can only be applied for after leave is obtained at the *ex parte* stage;

(e) bail pending a review is allowed under section 37 of the Act but under Order 53 of the RHC, nothing of this nature is envisaged.

Learned counsel further submitted that s. 37(4) of the Act requires the Sessions Court Judge to transmit to the High Court doing the review the exhibits tendered before him, the evidence admitted in court, the reasons for his decision and his finding on any question of law which arose during the inquiry. This is a clear indicator of a non-original jurisdiction of the "High Court in review" under s. 37 of the Act. Typically of a non-original jurisdiction court, the review court can "confirm", "vary" or "quash" the Sessions Court order or "make a new order in substitution ...". It is within the scheme of the Act to provide the quickest solution and final determination in an extradition requisition and proceedings by providing the mechanisms of "review" and *"habeas corpus"* as the only modes of challenge to a decision of the Sessions Court made under s. 19 of the Act.

Learned counsel also said that s. 22 of the CJA was quoted by the learned deputy for the support that the original criminal jurisdiction of the High Court is undefined. This is incorrect and of no support to his argument in this appeal as s. 22 of the CJA bears no relevance to extradition matters altogether as s. 22 of the CJA deals with criminal jurisdiction to "try" and "sentence". Extradition proceedings are not "trials", they are mere inquiries over "causes" that emanated outside our courts' jurisdiction, and no sentencing is carried out at the end of the extradition proceedings. The subject is simply "committed" to be "extradited" or "discharged". Section 22 is one of the many provisions in the CJA dealing with "criminal matter" or "criminal causes" that indicate that these provisions in the CJA apply only to matters of local crimes.

It was also the contention of learned counsel for the respondent that s. 50(1) of the CJA deals with the Court of Appeal's criminal appellate jurisdiction but this jurisdiction again relates to "criminal appeals" emanating from any decision of the High Court either in its original jurisdiction or in its appellate or revisionary jurisdiction in respect of any "criminal matter" decided by the Sessions Court.

Regarding the second issue, he submitted that the learned Deputy relied wholly on the decision of *Yong Teck Lee (supra)* which actually addresses wider issues, the major one being whether s. 36 of the Election Offences Act 1954, which purports to exclude any right of appeal to the Court of Appeal from a final order of an Election Judge, was inconsistent with art. 121(1B)(a) of the Federal Constitution.

The majority decision there held:

(a) the provision in the Federal Constitution, namely art. 121(1B)(a) cannot be read in isolation. It has to be read with the relevant provisions of the CJA. In that case, the Court of Appeal decided that the said Article must be read together with ss. 50 and 65 of the CJA which provide for the jurisdiction of the Court of Appeal in criminal and civil matters respectively. The Court of Appeal further held that since both these sections in the CJA were amended on the very same day namely 24 June 1994 as art. 121 which brought about the new art. 121(1B) and the creation of the Court of Appeal, there was therefore a clear intention by the Legislature that the said article and the said provisions in the CJA were to be read together;

(b) further, the majority in the Court of Appeal also adopted the observation made by Steve Shim, CJ (Sabah and Sarawak) in *Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd (supra)* wherein in an equivalent provision (art. 121(2)) resembling art. 121(1B) of the

Federal Constitution that the conspicuous absence of the word "all" or "any" preceding the word "decisions" in the article was pertinent. The learned CJ (Sabah & Sarawak) said:

> If it was the intention of Parliament to confer jurisdiction on the Federal Court to hear appeals from all decisions of the Court of Appeal, the word "all" or "any" would have been included therein. The exclusion of those words, in my view, was clearly deliberate. It was intended that not all decisions are appealable.

Learned counsel continued his submissions by stating that we have dealt with s. 50(1) of the CJA before this. This section regulates the sort of criminal cases that can be taken up to the Court of Appeal by way of an appeal to it. In regulating the procedure, only three categories of appeals from the High Court are allowed:

(a) cases emanating at the High Court in its original jurisdiction;

(b) cases emanating for the Sessions Court in respect of which the appeal to the High Court had been decided;

(c) cases emanating from the Sessions Court in respect of which the High Court had exercised its revisionary powers.

He submitted that the appellant does not come within any one of the three categories. Moreover, this is not a criminal appeal to the Court of Appeal. Read together, s. 50 of the CJA appears to similarly qualify art. 121(1B) of the Federal Constitution by providing regulatory mechanisms in a statute that limits appeals to the Court of Appeal.

He added that s. 37(6) of the Act, being such a regulatory statute, is not therefore unconstitutional and it is an incorrect reading to say s. 50(1) of the CJA and art. 121(1B) of the Federal Constitution confer a right of appeal to the Court of Appeal with no limitation. In the same breath and for the abovestated reasons, the minority judgment in *Yong Teck Lee (supra)* cannot be accepted. Further, acceptance of such an interpretation would create serious turmoil to the already stable provisions of the CJA over the years.

As for the third issue, learned counsel reiterated that this issue anchors on the earlier argument which was shown to be flawed, that the appellant has a right of appeal to the Court of Appeal under s. 50(1) of the CJA read together with art. 121(1B) of the Federal Constitution. The appellant's sole reason for the invocation of r. 137 of the RFC and the court's inherent jurisdiction is according to them "to correct an injustice by a denial to a litigant a final tier of appeal clearly provided by law". Learned counsel reminded the court that

since there is in fact no right of appeal for the appellant after the review, no question of injustice arises that requires the assistance of this court invoking its jealously guarded inherent jurisdiction. He was of the view that the *Megat Najmuddin* case *(supra)* has no application here. Clearly, he said, in *Megat Najmuddin (supra)*, the appellant had a clear substantive right of appeal to the Court of Appeal and the objection taken by the respondent was a mere technicality. It was, therefore, unmeritorious to deprive the appellant of the appeal right, the deprivation of the right being clearly offensive to the concept of justice. As such, r. 137 of the RFC on inherent jurisdiction was properly and legally invoked.

In the instant case, however, he said the appellant has no right of "appeal" after a "review", the defect is substantive and not a mere technicality. It is wanting in jurisdiction. It is incurable as it is illegal and not a mere irregularity. There is, therefore, no jurisdiction for this court to invoke r. 137 of the RFC. In fact, invoking it will cause manifest injustice to the respondent bringing total irony to the situation.

Similarly, he added, in *MGG Pillai (supra)*, there was a clear question of illegality, the earlier judgment being invalid as it was delivered by an improperly constituted quorum without the consent of the parties. Further, it was held that the required consent was a substantive accrued right of the parties. The same goes for *Chia Yan Tek (supra)*. Learned counsel did not understand why *Lye Thai Sang (supra)* was quoted by the appellant as it is unhelpful and totally against them. Similarly, learned counsel was puzzled over the reference to *Tai Chai Yu (supra)*.

Learned counsel also distinguished the facts in *Pinochet Ugarte (supra)* as the order for a newly constituted quorum of the House of Lords to rehear General Pinochet's appeal occurred because the earlier quorum was tainted with the illegality of the presence of Lord Hoffmann who in law was deemed to be an interested party and therefore deemed biased which was a long cry from our present case.

Concerning the fourth issue, learned counsel said that whether a word or phrase bears a certain meaning or not depends very much on the context in which it is used. This is especially true in law. It is for that reason that in *Amand v. Secretary of State for Home Affairs and Another* [1942] 2 All ER HL 381at p. 382, Viscount Simon LC delivering the main judgment in the House of Lords asked:

> The whole question is whether the appeal from the Divisional Court to the Court of Appeal was an appeal from a 'judgment of the High Court in any criminal cause or matter' within the meaning of the Supreme Court of Judicature (Consolidation) Act, 1925, Section 31.

This authority was cited in *Ex parte Osman (supra)* which was referred to by the learned deputy.

Isolating s. 37 of the Act and within its own context, the "review" process therein is certainly a continuation of a criminal proceeding as an extradition proceeding itself in general is a criminal proceeding. In that isolated context, the review is a "criminal matter". But with the greatest of respect, learned counsel said that is not the issue we are facing. The learned deputy asked the wrong question. The correct question should have been:

> Is the "review" under section 37 of the Act a "criminal matter" within the meaning of section 50 of the CJA as a whole, in particular section 50(1) of the CJA?.

Learned counsel reminded us that the appeal to the Court of Appeal under s. 50 was misconceived, as held by the Court of Appeal itself, because the appeal does not fall within any "criminal matter" decided by the High Court in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by the Sessions Court. The appellant did not take up at the Court of Appeal any argument that their appeal related to the exercise of an original jurisdiction by the High Court on the "review" under s. 37 of the Act by it. This the appellant did not do as they knew it was not an original jurisdiction exercised by the High Court.

In conclusion, he added, since a s. 37 review is not an appeal to, or a revision by, or an exercise of original jurisdiction of, the High Court, the "matter" cannot be a "criminal appeal" or "criminal matter" within the meaning of s. 50(1) of the CJA. For completion, the appellant's appeal to this court cannot come within the meaning of s. 87 of the CJA.

Not surprisingly, he went on to say, in this very extradition proceedings, in a pre-committal judicial review proceedings brought about by the respondent under O. 53 of the RHC before KC Vohrah, J the learned judge having granted leave for various applications for *certiorari*, also granted "stay" of the extradition proceedings in the Sessions Court. During the objection for stay, the appellant herein raised the issue of s. 54(e) of the Specific Relief Act 1950 (hereinafter "the SRA") in support of their argument. Section 54(e) of the Act reads:

54. An injunction cannot be granted

…

(e) to stay proceedings in any criminal matter;

The learned judge rejected the applicability of the section as he accepted the contention that s. 54(e) of the SRA relates to "local criminal matter" and not "foreign criminal matter" such as that in extradition proceedings. The learned judge agreed that the whole purpose of s. 54(e) of the SRA was to prevent applications in civil courts for injunctions to "scuttle ordinary criminal trials in the criminal courts" and that would be against public policy. But this reasoning, whilst totally relevant to local crime, is totally irrelevant in an extradition matter.

Learned counsel continued by saying that *Ex-Parte Osman (supra)* is therefore unhelpful as there, within the context of deciding if costs ought to be ordered against the applicant of an unsuccessful *habeas corpus* application relating to an extradition requisition against him, the term "criminal matter" was differently interpreted. Within the peculiar wordings and context of the relevant legislation, the Queen's Bench Division held that a *habeas corpus* application over an extradition requisition was a criminal matter or cause. But it is clearly in a context not applicable here. *Re Naranjan Singh* [1961] 2 All ER 565 and *Union of India v. Manohar Lal Narang and Another* [1977] 2 All ER 348 are in fact cases that merely decided on issue of costs in *habeas corpus* applications. They are far from clarifying the issues herein.

Finally, on the fifth issue, learned counsel's reply was that the appellant invoked art. 128(2) of the Federal Constitution only at the hearing of this "appeal". Referring to the "Notice of Appeal" signed by the Public Prosecutor on 13 May 2003, he said it was clear that the appellant invoked the process of appeal, and not the original jurisdiction of this court. This must be by virtue of art. 128(3) of the Federal Constitution which reads:

128(3) The jurisdiction of the Federal Court to determine appeals from the Court of Appeal, a High Court or a judge thereof shall be such as may be provided by federal law.

As far as the federal law is concerned as regard appeals to the Federal Court, he submitted, it is only s. 87 of the CJA. The appellant has failed to meet the requirements of s. 87 of the CJA and the matter must therefore drop there. The appeal papers prepared by the appellant herein indicate clearly they did not invoke art. 128(2) of the Federal Constitution or s. 87 of the CJA.

In reply to learned counsel holding a watching brief for the Government of India, he submitted that the Government of India complained that there is inequality of remedies. Under s. 36 of the Act, the respondent is allowed to go up all the way to the Federal Court by way of habeas corpus, if he loses, whereas in the case of the Public Prosecutor, if they were unsuccessful at the Sessions Court, their only remedy is a one tier "review" under s. 37 of the Act.

Learned counsel for the respondent submitted that it is not offensive to art. 8 of the Federal Constitution to provide an unequal measure of the type of remedies to opposing parties when one of them is the Government, be it represented by the local Public Prosecutor or the requesting country, in this case the Government of India. In criminal proceedings, extradition is but a criminal proceeding of some sort, the golden thread that runs through its criminal justice system is that the liberty of the individual is to be jealously guarded. Over-bearing laws that act contrary to liberty is never encouraged. Only minimal intrusion into an individual's liberty is allowed under the criminal justice system. For that reason, it is said that since the entire might and mechanism of the state has been brought to bear upon a single individual impinging on his liberty, be it in a prosecution or an extradition proceeding, more leeway is given to the individual to protect and recover his liberty in the soonest time possible.

Prolonged appellate process, he added, especially involving many tiers of appeal is discouraged against an individual who is freed by the court of first instance. It is for that reason that in England and Ireland, the prosecution is not given any right of appeal if the jury had acquitted the accused. But if the accused is convicted, he is allowed to appeal all the way up to the House of Lords. Similar provisions were adopted in jury trials in this country until amended not so long ago after episodes of "perverse findings by the jury". In those circumstances, in spite of the different and unequal measure of remedies existing for opposing parties, there was no question of art. 8 of the Federal Constitution being breached.

He added that ss. 36 and 37 of the Act are not flip sides of the same coin as interpreted by learned counsel for the Government of India. They clearly provide different remedies and different opportunities of the tiers to the remedy. For an individual who is not successful in defending himself against an extradition request in the court of first instance, he is given the fullest latitude and the maximum opportunity to "appeal" by *habeas corpus* and appeals, for purposes of restoring his liberty which the law cherishes and protects.

Regarding the second point of learned counsel for the Government of India, learned counsel for the respondent remarked that looking at the notice of appeal of the appellant, there is not even a mention that they were appealing on the striking down of the s. 41 fiat as well. As such, the appellant cannot come now to this court, while admitting that this point is only collateral, "of rights of appearance and audience not affecting the main question under s. 37 of the Act", compounded by the total lack of intention to appeal, to seek audience to use this "collateral question" as a back door method of entry into the main question under s. 37 which is itself a "closed door".

In our view, the only point to really consider is whether an appeal lies to this court under s. 87(1) of the CJA and in view of the provision in s. 37(6) of the Act which states that "any such order of the High Court shall be final and conclusive".

For completeness, we will now reproduce the relevant text book material on the subject the contents with which we may not totally agree.

At p. 131 of the second edition of Gordon J Borrie's Public Law, the author states:

> Thus, a provision that a tribunal's decision "shall be final and not subject to appeal to any court" is not effective to prevent review by the High Court on the ground, for example, that the tribunal has acted *ultra vires*. Moreover, as we have already seen, the House of Lords decided in *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 AC 147, that a provision, such as that contained in section 4 of the Foreign Compensation Act 1960, that a tribunal's determination "shall not be called in question in any court of law" is ineffective if that determination is a nullity. A determination is a nullity, said Lord Reid, if the body has no jurisdiction to enter on the enquiry, or gave the decision in bad faith, or had no power to make the decision, or failed to comply with the rules of natural justice, or failed to take into account something it ought to have taken into account, or based its decision on some matter it had no right to take into account. On the other hand, error of law alone does not make a decision a nullity.

R.H. Hickling in *Malaysian Public Law* at pp. 186 to 189 had this to say:

> The legislative draftsmen have accepted the challenges offered by the judiciary, and their efforts may be observed in a series of cases, which reflect the changing attitudes of the judges. In 1894 the House of Lords considered, but merely obiter, that subsidiary legislation made under an Act of Parliament and expressed in the Act itself to "have effect as if enacted in this Act" was unchallengeable (*Institute of Patent Agents v. Lockwood* [1894] AC 347). At last, the keen judicial eye noticed that such a formula as that providing that

subsidiary legislation "shall have the same effect as if enacted in this Act" is more than a delegation, but in fact the granting of full legislative power. In consequence, the practice of using such a formula fell into disuse. In its place, the draftsmen turned to new formulas, aiming directly at ousting judicial control. Such formulas in general seek to put a procedural block upon any judicial challenge.

Statutes began to provide that administrative actions "shall be final and conclusive", "shall not be questioned in any legal proceedings whatsoever", or "shall not be subject to appeal or review in any court". All such words were designed to prevent the judges turning their attention to the actions of the executive. With no system of droit administrative on French lines, the lawmakers sought to exclude judicial review of administrative action.

The famous *Anisminic* case of 1969 (*Anisminic Ltd v. Foreign Compensation Commission* [1969] 2 AC 147 HL) illustrates the ingenuity of the judges, when faced with a statute which provided that "the determination of any application made [to the Foreign Compensation Commission] … shall not be called in question in any court of law". The plaintiffs challenged a decision of the Commission, asserting that it had made an error of law in exercising its powers. Relying on the ouster provision in the statute, the Commission claimed that its determination could not be subjected to judicial review.

On appeal, the House of Lords ingeniously took the view that the word "determination" meant a determination that was valid. Explaining the decision in 1983, Lord Diplock said that:

> The breakthrough that Anisminic made was the recognition by the majority of [the House of Lords] that if a tribunal whose jurisdiction was limited by statute or subordinate legislation mistook the law applicable to the facts as it found them, it must have asked itself the wrong question, ie, one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported 'determination', not being 'a determination' within the meaning of the empowering legislation, was accordingly a nullity (*O'Reilly v. Mackman* [1982] 3 All ER 1124 at 1129).

In other words, the skill of the draftsman cannot cure a decision founded on a misconception of the law.

Ouster clauses haunt the Malaysian statute book, and the judiciary has followed the policy set out in the words of Lord Reid in the Anisminic case, when he said that "a provision ousting the ordinary jurisdiction of the courts must be construed strictly, meaning, I think, that if such a provision is reasonably capable of bearing two meanings the meaning should be taken which preserves the ordinary jurisdiction of the courts". Indeed, short of establishing an entirely separate system of administrative courts, on the French lines, no common law lawyer can accept a situation in which any administrative authority is beyond judicial control.

Section 39(3)(a) of the Industrial Relations Act 1967 (Act 1977) provided that an award of the Industrial Court "shall be final and conclusive, and no award shall be challenged, appealed against, reviewed, quashed or called in question in any court of law". It would be difficult to imagine any more forthright wording, and the use of the word "quashed" was clearly aimed at order of *certiorari*, used to quash decisions of inferior tribunals.

The words fell for judicial construction in what came to be known as the *Fire Bricks* case, in 1980 (*South East Asia Fire Bricks Sdn Bhd v. Non-Metallic Mineral Products Manufacturing Employees Union and Ors* [1980] 2 MLJ 165). In this case a trade union representing the majority of workers with a company called for a strike. The company then issued a notice, that if employees on strike failed to return to work within forty-eights hours, their services would be deemed to be terminated. The dispute between the union and the company was then referred by the Minister to the Industrial Court. Four days later, the workers went back to work, and were told they had been dismissed. The Industrial Court then made an award in favour of the employees, on the ground that they had not by going on strike terminated their contracts of employment, and thereupon ordered the company to reinstate them.

The company then applied to the High Court, which by *certiorari* quashed the decision of the Industrial Court, on the ground that there was an error on the face of the record. On appeal, the Federal Court ruled that there had been no error of law, and noted the decision of the Industrial Court. Before the Privy Council (exercising an appellate jurisdiction that disappeared in 1985 with the repeal of article 131 of the Constitution) it was argued that the High Court had no jurisdiction to quash the award of the Industrial Court on the ground of error of law. The Privy Council took the view that on the facts of the case the Industrial Court had jurisdiction to deal with the matter, one not affected by errors on the face of the record. Indeed, Lord Fraser suggested that the ouster clause would effectively oust the remedy of *certiorari* when an inferior tribunal such as the Industrial Court had merely made an "error of law", provided that the error of law did not affect the jurisdiction of the tribunal, and its decision was not a nullity for such reason as a breach of the rules of natural justice.

The *Fire Bricks* case thereby preserved a distinction between an error of law on the face of the record and an error of jurisdiction, a distinction Lord Denning had in 1979 (*Pearlman v. Harrow School* [1979] 1 QB 56 at 70) wished to be discarded. "No Court or tribunal," he then said, "has any jurisdiction to make an error of law on which the decision of a case depends". Yet the Fire Bricks case haunted Malaysian law for fifteen years, until the Court of Appeal held it no longer good law (*Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] CLJ JT(17), [1995] 2 MLJ 317. No inferior tribunal has any jurisdiction to commit an error of law, whether or not the error goes to jurisdiction. Not even an ouster provision so

widely drafted as that of the Industrial Relations Act could exclude the activities of the Industrial Court from judicial review. While the complexities of every case are such that it is not easy to prescribe a generally satisfactory proposition, that laid down by Syed Othman J (as he then was) in 1974 offers the student a useful guide:

> I am inclined to think that the better view of the law is that a plea that the Court cannot interfere with a decision by reason of an ouster clause will only be accepted if the decision was reached according to the law. If the decision is not according to law, the Court would invariably interfere with it. To my mind, a decision not according to law is no decision at all (*Kannan and Anor v. Menteri Buruh dan Tenaga Rakyat and Ors* [1974] 1 MLJ 90.

While, therefore, the term "judicial power" has vanished from article 121 of the Constitution, it still – fortunately for the ordinary citizen – remains alive in the hearts and minds of the judiciary. The courts remain free to ensure that any administrative decision has been properly reached: and only then does any immunity conferred by an ouster clause become effective. Thomas Fuller, a royalist supporter in the English Civil War, said, "Be you ever so high, the law is above you". These words were quoted by Lord Denning in 1977, (*In Gouriet v. National Union of Post Office Workers* [1977] 1 All ER 696: a case in which it was held that the refusal of the Attorney-General to take action cannot be challenged by an individual, on any grounds) and may be said to represent the essential principle of our administrative law.

At p. 226 of the same text, he touched on the subject of judicial review. For ease of reference, it is reproduced below:

Judicial Review

The major constitutional problem that has arisen since Merdeka, and has not been resolved, resides in the relationship between Government and the judiciary. This, again, is part of the colonial legacy of an independence shaped by the common law.

What has emerged quite starkly in recent years is the unsatisfactory nature of the common law system in relation to its control over government. The old prerogative remedies of *certiorari* and the like have been, it is true, blended with the idea of natural justice, to produce a large body of what is now called administrative law. On perceiving this, the English judiciary, not a body noted for its modesty, supposed that they had thereby successfully adapted the common law to the needs of an increasingly restless, increasingly individualistic society.

> The practice of judicial review, recently described by a British minister as "one of the great growth industries of our time", opened up a primrose path, taking the judges further and further away from their original judicial functions. Indeed, in a draft but undelivered speech the Lord Chancellor, Lord Mackay, recently suggested that it is "dangerous and mistaken" to argue that there is some form of authority in the courts that is superior to Parliament (Daily Telegraph, 7 December 1995; see also Sunday Telegraph, 10 December 1995). A member of the British Parliament, Sir Ivan Lawrence QC, was reported to have said that "life was becoming impossible for ministers whose every administrative decision was challenged in the courts" *(Ibid)*. Ready provision of legal aid has assisted this process.
>
> Malaysians themselves are well aware of the conflicts that have since Merdeka erupted between Government and the judiciary. Ministers, apparently in charge of particular departments, and responsible to Parliament and the electorate, have found their decisions, taken after advice from competent civil servants, set aside by the judiciary. The end result has been indignation on the part of the executive, hurt feelings on the part of a conscientious judiciary, a disgruntled Bar, and a general lowering of public confidence in the entire system of government.
>
> Some years ago, in the High Commissioner's Office in Aden, there was a photograph of a derailed engine, with a caption, "Nobody's fault". What has gone wrong here is, again, nobody's fault. The common law has proved inadequate, imperfect. We have become accustomed to believe that the common law system is the best of all possible systems, and so, in some respects, it is. However, in the realm of administrative law, in the area of conflict between the individual and the Government, it has produced dissension, and the dissention tends to get worse, with the Government flying to the legislature, in order to limit the operation of judicial review of administrative action.

Clive Lewis in his book *Judicial Remedies in Public Law* at pp. 315 and 316 wrote as follows:

> Statutory provisions are found from time to time which seek to oust or restrict the supervisory jurisdiction of the courts to determine the lawfulness of particular decisions or exercises of power. Such provisions are variously referred to as ouster, privative, protective or preclusive clauses. Such clauses tend to fall into one of two groups. There are those clauses which seek to oust the jurisdiction of the courts completely, and render a decision immune from any challenge, in the courts. A variety of formulae have been used to achieve this result and they are considered below. Then there are those clauses which exclude judicial review but provide some other remedy which allows challenges to be made, but may restrict the scope of such challenge. Such remedies may, for example, impose a very short time period for seeking the remedy, or limit the grounds of challenge, or the range of people who may challenge.

The courts have traditionally been hostile to complete ouster clauses. They have adopted restrictive interpretations of such clauses, which has largely deprived them of any meaningful effect. The courts have therefore maintained their supervisory jurisdiction largely intact. Statutory reforms have also assisted the courts in ensuring that they are not precluded from determining whether statutory decision-makers are acting lawfully.

The courts have taken a more lenient view of clauses which restrict the scope of challenge but which leave open the possibility of judicial supervision. Such partial ouster clauses are seen as akin to limitation clauses, not exclusion clauses ...

Statute may provide that a decision is to be "final" or "final and conclusive." Such clauses do not exclude judicial review. It is "… well settled that the remedy by certiorari is never to be taken away by any statute except by the most clear and explicit words." (Per Denning LJ in *R. v. Medical Appeal Tribunal, ex p. Gilmore* [1957] 1 QB 574 at p. 583. See also *R. v. Hallstrom, ex p. Waldron* [1986] QB 1090). *Certiorari,* (*R. v. Medical Appeal Tribunal, ex p. Gilmore (ibid); South East Asia Fire Bricks Sdn. Bhd. v. Non Metallic Mineral Products Manufacturing Employees Union* [1981] AC 363 and the other prerogative remedies, together with declarations and injunctions in their public law role, remain available (see eg, *Pollway Nominees v. Croydon London Borough Council* [1987] AC 79). Decisions may still be reviewed either where they are *ultra vires* or where they exhibit an *intra vires* error of law which appears on the face of the record *(Ex p. Gilmore (supra).*

Finality clauses will exclude an appeal both on facts and law. There are *dicta* in the Court of Appeal suggesting that such clauses only exclude appeal on facts, and do not exclude an appeal on a point of law (In *Pearlman v. Keepers and Governors of Harrow School* [1979] QB 56, per Lord Denning MR at p. 71, Eveleigh LJ at p. 79). However, there are contrary dicta in the House of Lords (In *Re Racal Communications* [1981] AC 374, per Lord Diplock (Lord Keith agreeing) at p. 382). In one sense, the point is not of importance since an error of law can as easily be corrected by judicial review as by appeal.

This interpretation has been justified on the grounds that review for jurisdictional error does not involve questioning a decision, rather it involves determining whether in law any decision exists. In the case of *intra vires* errors, however, a valid decision does exist but it is patently flawed. To quash such a decision would involve questioning the decision, not merely determining its validity. In truth, the explanation lies in the extreme reluctance of the courts to allow their role in ensuring that power is exercised lawfully to be circumscribed by such provisions. The development of the presumption that all errors of law by a body of limited jurisdiction are *ultra vires* errors reflects he courts' view that they should be the ultimate arbiters of questions of law.

Before we conclude, it is pertinent to refer to another recent decision of this court on ouster clauses. In dealing with the provisions of the Immigration Act 1959/63, hereinafter "the IA", we decided in *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan* [2002] 4 CLJ 105 that:

(a) the explanatory statement to the Bill, which is an aid to interpretation, states that the new s. 59A seeks to provide for the exclusion of judicial review in any court of any act done or any decision made by the Minister or the Director General, or in the case on an East Malaysian State, the State Authority under the IA save for questions on procedural compliance. It is clear from that statement that the intention of Parliament in amending s. 59A of the IA by providing new provisions is to exclude judicial review by the court of any act done or any decision of the Minister or the Director General or the State Authority under the IA except on grounds of procedural non-compliance of the IA or regulations governing the IA or decision;

(b) by deliberately spelling out that there shall be no judicial review by the court of any act or decision of the Minister or the decision-maker except for non-compliance of any procedural requirement, Parliament must have intended that the section is conclusive on the exclusion of judicial review under the IA. Consequently, it is not permissible for the courts to intervene and disturb a statutorily unreviewable decision on the basis of substantive unfairness as a separate ground of judicial review which even the English courts in common law have not recognized;

(c) the doctrine of substantive fairness cannot therefore be invoked as a ground of judicial review of an administrative decision. From the clear wording of s. 59A, Parliament must have intended to conclusively exclude judicial review except on grounds of procedural defects under the IA or regulations made thereunder. The combined effect of the exclusion of the right to be heard as provided in s. 59 of the IA and the ouster clause provided in s. 59A thereof has excluded review in respect of the direction given by the State Authority under s. 65(1)(c) of the IA on any ground except in regard to any question relating to compliance with any procedural requirement of the IA or regulations made thereunder governing that act or decision.

All things considered, we can only conclude that we are in agreement with the Court of Appeal on its findings. We would, therefore, hold that no appeal lies to this court. As such, we decline to make any ruling on the subsidiary issues raised in the arguments. Accordingly, we would strike out the notice of appeal.

The issue of costs was further argued before us today and after hearing both Azhar Azizan Harun of learned counsel for the respondent and the learned Deputy Public Prosecutor Abdul Karim Abdul Jalil for the appellant, we are of the opinion that there is no merit in the submissions of learned counsel for the respondent. We take this view because costs cannot be awarded against the Public Prosecutor pursuant to s. 322(iii) of the Criminal Procedure Code.

This judgment is given pursuant to s. 78 of the CJA in view of the retirement of our learned brother Mohd Noor Ahmad FCJ before the delivery of this judgment although he has in fact given his approval to the draft of this judgment before his retirement.